

1  
2  
3  
4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 NANCY SAMPSON,  
7 Plaintiff,  
8 v.  
9 CAROLYN W. COLVIN,  
10 Commissioner of Social Security<sup>1</sup>,  
11 Defendant.

NO. CV-11-03127-JLQ

MEMORANDUM OPINION AND  
ORDER RE: MOTIONS FOR  
SUMMARY JUDGMENT

12 BEFORE THE COURT are Cross-Motions for Summary Judgment. (ECF  
13 NO. 17 & 23). Plaintiff is represented by **James Tree**. Defendant is represented  
14 by Assistant United States Attorney **Pamela J. DeRusha** and Special Assistant  
15 United States Attorney **Kathy Reif**. This matter was previously before Magistrate  
16 Judge Imbrogno. It was reassigned to the undersigned for all further proceedings  
17 on May 1, 2013. The court has reviewed the administrative record and the parties'  
18 briefs. The case was submitted for decision without oral argument on May 6,  
19 2013.

20 This court's role on review of the decision of the Administrative Law Judge  
21 (ALJ) is limited. The court reviews that decision to determine if it was supported  
22 by substantial evidence and contains a correct application of the law. *Valentine v.*  
23 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9<sup>th</sup> Cir. 2009). This court is

24  
25 <sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of Social  
26 Security on February 14, 2013. Pursuant to Rule 25(d) of the  
27 Federal Rules of Civil Procedure, Ms. Colvin is substituted for  
28 Michael Astrue as the Defendant in this suit. No further action  
need be taken to continue this suit by reason of the last sentence  
of 42 U.S.C. 405(g).

1 obligated to affirm the ALJ's findings if they are supported by the evidence and  
2 reasonable inferences to be drawn therefrom. *Molina v. Astrue*, 674 F.3d 1104,  
3 1110-11 (9<sup>th</sup> Cir. 2012). Substantial evidence is such relevant evidence that a  
4 reasonable mind might accept as adequate to support the conclusion.

### 5 **I. JURISDICTION**

6 In January 2009, Plaintiff/Claimant Nancy Sampson filed an application for  
7 supplemental security income (SSI) alleging a disability onset date of January 1,  
8 2009. Plaintiff alleges disability primarily attributable to mental impairments  
9 including anxiety and post-traumatic stress disorder (PTSD). Plaintiff also alleges  
10 pain in her neck and degenerative disc disease. Her application was denied  
11 initially, and on reconsideration. After timely requesting a hearing, Plaintiff  
12 appeared before Administrative Law Judge Donna Shipps on September 29, 2010.  
13 (Transcript at ECF No. 11-2 pages 41-75). The ALJ issued a decision denying  
14 benefits on November 9, 2010. (ECF No. 11-2, p. 14-24). Plaintiff filed a request  
15 for review with the Appeals Council, which was denied on October 25, 2011. The  
16 decision of the ALJ became the final decision of the Commissioner, which is  
17 appealable to the district court pursuant to 42 U.S.C. § 405(g).

### 18 **II. SEQUENTIAL EVALUATION PROCESS**

19 The Social Security Act defines "disability" as the "inability to engage in  
20 any substantial gainful activity by reason of any medically determinable physical  
21 or mental impairment which can be expected to result in death or which has lasted  
22 or can be expected to last for a continuous period of not less than twelve months."  
23 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant  
24 shall be determined to be under a disability only if the impairments are of such  
25 severity that the claimant is not only unable to do her previous work but cannot,  
26 considering claimant's age, education and work experiences, engage in any other  
27 substantial gainful work which exists in the national economy. 42 U.S.C. §§  
28 423(d)(2)(A), 1382c(a)(3)(B).

1 The Commissioner has established a five-step sequential evaluation process  
2 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920;  
3 *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987):

4 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
5 §§ 404.1520(b), 416.920(b). If she is, benefits are denied. If she is not, the  
6 decision maker proceeds to step two.

7 Step 2: Does the claimant have a medically severe impairment or  
8 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the  
9 claimant does not have a severe impairment or combination of impairments, the  
10 disability claim is denied. If the impairment is severe, the evaluation proceeds to  
11 the third step.

12 Step 3: Does the claimant's impairment meet or equal one of the listed  
13 impairments acknowledged by the Commissioner to be so severe as to preclude  
14 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. Pt.  
15 404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
16 impairments, the claimant is conclusively presumed to be disabled. If the  
17 impairment is not one conclusively presumed to be disabling, the evaluation  
18 proceeds to the fourth step.

19 Step 4: Does the impairment prevent the claimant from performing work she  
20 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant  
21 is able to perform her previous work, she is not disabled. If the claimant cannot  
22 perform this work, the inquiry proceeds to the fifth and final step.

23 Step 5: Is the claimant able to perform other work in the national economy  
24 in view of her age, education and work experience? 20 C.F.R. §§ 404.1520(f),  
25 416.920(f).

26 The initial burden of proof rests upon the Plaintiff to establish a prima facie  
27 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921  
28 (9th Cir. 1971). The initial burden is met once a claimant establishes that a

1 physical or mental impairment prevents her from engaging in her previous  
 2 occupation. The burden then shifts to the Commissioner to show (1) that the  
 3 claimant can perform other substantial gainful activity and (2) that a "significant  
 4 number of jobs exist in the national economy" which claimant can perform. *Kail*  
 5 *v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

### 6 **III. STANDARD OF REVIEW**

7 "The [Commissioner's] determination that a claimant is not disabled will be  
 8 upheld if the findings of fact are supported by substantial evidence and the  
 9 [Commissioner] applied the proper legal standards." *Delgado v. Heckler*, 722  
 10 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is  
 11 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th  
 12 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599,  
 13 601-602 (9th Cir. 1989). "It means such relevant evidence as a reasonable mind  
 14 might accept as adequate to support a conclusion." *Richardson v. Perales*, 402  
 15 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as  
 16 the [Commissioner] may reasonably draw from the evidence" will also be upheld.  
 17 *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court  
 18 considers the record as a whole, not just the evidence supporting the decision of  
 19 the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989). This  
 20 court may set aside a denial of benefits only if the basis for denial is not supported  
 21 by substantial evidence or if it is based on legal error. *Thomas v. Barnhart*, 278  
 22 F.3d 947, 954 (9th Cir. 2002). It is the role of the trier of fact, not this court, to  
 23 resolve conflicts in the evidence. *Richardson*, 402 U.S. at 400. If the evidence  
 24 supports more than one rational interpretation, the court must uphold the decision  
 25 of the ALJ. *Thomas*, 278 F.3d at 954 (9<sup>th</sup> Cir. 2002).

### 26 **IV. STATEMENT OF FACTS**

27 The facts are contained in the medical records, administrative transcript, and  
 28 the ALJ's decision, and are only briefly summarized here. At the time the ALJ

1 issued her decision, Plaintiff was 52 years old. Plaintiff is a high school graduate.  
2 Plaintiff's most recent relevant work experience was as a home health aid, which  
3 she last performed in 1999. Thus, Plaintiff had not worked for approximately 10  
4 years prior to the alleged disability onset date of 2009.

5 Plaintiff claimed disability based primarily on her anxiety and degenerative  
6 disc disease. The ALJ found Plaintiff was not disabled.

#### 7 **V. COMMISSIONER'S FINDINGS**

8 The ALJ found at **Step 1** that Plaintiff had not engaged in substantial  
9 gainful activity since January 13, 2009, the application date.

10 At **Step 2**, the ALJ found the medical evidence established the following  
11 severe impairments: chronic pain secondary to degenerative disc disease; anxiety  
12 disorder; post traumatic stress disorder; and panic disorder .

13 At **Step 3**, the ALJ determined that the Plaintiff's impairments or  
14 combination of impairments did not meet or medically equal one of the listed  
15 impairments in 20 CFR Part 404, Subpart P, Appendix 1. Specifically, the ALJ  
16 considered whether Plaintiff met Listing 1.04 for degenerative disc disease and  
17 found that the records did not support such a finding as there was no evidence of  
18 nerve root compression or motor loss accompanied by sensory or reflex loss. The  
19 ALJ also considered whether Plaintiff's mental impairments, singly and in  
20 combination, met or medically equaled Listing 12.04 and 12.06.

21 At **Step 4**, the ALJ found that Plaintiff had the residual functional capacity  
22 ("RFC") to perform a range of medium work as defined in 20 CFR 416.967(c).  
23 The ALJ found Plaintiff could work away from the general public, and could work  
24 in proximity to others, but not in close cooperation. The ALJ found the Plaintiff  
25 "can work in jobs that do not require regular change in the duties or work  
26 environment." (ECF No. 11-2, p. 18).

27 In making this determination, the ALJ found that Plaintiff's medically  
28 determinable impairments could reasonably be expected to cause the alleged

1 symptoms, but that Plaintiff's statements concerning the intensity, persistence and  
2 limiting effects of her symptoms were not entirely credible. (*Id.*). In finding  
3 Plaintiff not credible, the ALJ considered her daily activities and her voluntary  
4 disregard of medical advice. The ALJ observed that Plaintiff recognized  
5 Cymbalta was helpful for her depression and anxiety and voluntarily stopped  
6 taking it. The ALJ observed that Plaintiff was able to care for her two  
7 grandchildren. The ALJ also believed that Plaintiff's long-term reliance on public  
8 assistance and her comment that she would rather care for her grandchildren than  
9 pursue employment lessened her credibility and raised the issue of secondary gain.

10 The ALJ concluded the Step 4 analysis by finding that Plaintiff was unable  
11 to perform her past relevant work.

12 At **Step 5** the ALJ found, considering Plaintiff's age, education, work  
13 experience, and residual functional capacity, that there were a significant number  
14 of jobs in the national economy that Plaintiff could perform. The ALJ consulted a  
15 vocational expert who testified based on hypothetical questions that an individual  
16 with Plaintiff's limitations would be able to perform jobs such as laundry spotter,  
17 small products assembler, and charge account clerk. The ALJ concluded Plaintiff  
18 was not disabled.

## 19 VI. ISSUES

20 Plaintiff's briefing identifies three issues for review: 1) did the ALJ err in  
21 improperly rejecting the opinions of Ms. Sampson's treating and examining  
22 medical providers; 2) did the ALJ err in improperly rejecting Ms. Sampson's  
23 subjective complaints; and 3) did the ALJ err at Step 5 in identifying jobs Ms.  
24 Sampson could perform? (ECF No. 18, p. 11). These are the issues for review.  
25 The court will not search the brief for further issues, and should not address issues  
26 which are not specifically identified nor supported with developed arguments. See  
27 *Carmickle v. Commissioner*, 533 F.3d 1155, 1161 n. 2 (9<sup>th</sup> Cir. 2008)(noting that  
28 the court will generally "not consider matters on appeal that are not specifically

1 and distinctly argued in appellant's opening brief").

## 2 VII. DISCUSSION

### 3 A. Did the ALJ err in improperly rejecting the opinions of Plaintiff's 4 treating and examining medical providers?

5 Plaintiff argues that the ALJ improperly rejected the opinions of Dr. Crane,  
6 Leslie Thompson, David Hulslander, and Brett Wenger. (ECF No. 18, p. 13).  
7 Thompson, Hulslander, and Wenger all appear to be mental health counselors with  
8 the following credentials: Hulslander, B.A.(Bachelor of Arts); Thompson,  
9 M.A.(Master of Arts); and Wenger, LMHC (Licensed Mental Health Counselor).  
10 Plaintiff also makes one brief mention of Dr. Mashburn. (ECF No. 18, p. 16). The  
11 medical record overwhelmingly supports the ALJ's decision and the ALJ gave  
12 sufficient explanation to the weight afforded the various medical providers.

13 The record does not establish that Plaintiff had marked physical  
14 impairments that rendered her unable to work. The references to degenerative disc  
15 disease in the record describe it as "mild". See for example (ECF No. 11, p. 249,  
16 349, 400). Although Plaintiff did at times report pain, stiffness, and/or numbness  
17 related to this condition, when she saw Dr. Hoover in March 2009, she was  
18 "significantly better on celexa" and reported being "pain free today". (ECF No. 11,  
19 p. 244). Dr. Hoover also reported that Plaintiff's range of motion was not limited,  
20 and reported her neck pain and headaches as "mild". (*Id.* at 247-250). An Imaging  
21 of Plaintiff's spine in July 2009 resulted in the impression of "mild" degenerative  
22 disc disease. (*Id.* at 349).

23  
24 Plaintiff's more serious impairments appear to be mental - - anxiety and  
25 PTSD. This is notable, because according to the office visit records of Dr. Hoover  
26 in March 2009, Plaintiff believed she was entitled to disability for her physical  
27 limitations. According to Dr. Hoover's notes: "asked her for what reasons she si  
28 seekign [sic] dshs coverage feels she should get dshs for her neck 'I want to



1 double check that injury.’ today she doesn’t think there are any other reasons she  
2 should get dshs...antidepressants working really great for her is off muscle relaxer  
3 she has no pain today.” (ECF No. 11, p. 244).

4 A psychiatric review by Dr. Bailey in March 2009 concluded that Plaintiff’s  
5 mental impairments resulted only in mild restriction of activities of daily living,  
6 mild difficulties in social functioning, and mild difficulties in maintaining  
7 concentration, persistence, or pace. (ECF No. 11, p. 280). In April 2009 during  
8 mental health counseling she told Mr. Hulslander that she was interested in taking  
9 up cycling and doing more outdoor activities to get in shape. (*Id.* at 308). Plaintiff  
10 also reported to Hulslander that she “stopped taking her Celexa because it  
11 interfered with her sex life, her art, and her writing” and that she planned to treat  
12 her anxiety through yoga. (*Id.* at 311). When Brett Wenger performed a  
13 psychological/psychiatric evaluation in December 2009, he reported that Plaintiff  
14 was taking Cymbalta, an anti-depressant, with benefit to all areas of function and  
15 that Plaintiff would likely be able resume substantial gainful activity. (*Id.* at 352-  
16 54).

17  
18 When Plaintiff saw Dr. Coffey, Pharm. D., in October 2009, she reported  
19 that anxiety was her most bothersome symptom. She also reported she was “doing  
20 better” and is able to sleep 8 hours a night. Dr. Coffey prescribed Cymbalta and  
21 Plaintiff admitted that Cymbalta was “helpful for her depression and anxiety” at an  
22 office visit in January 2010, but she decided to stop taking it because of something  
23 she had read concerning side effects. (*Id.* at 376). Dr. Coffey also found that  
24 Plaintiff had no impairment of memory or intellectual functioning and that her  
25 insight and judgment were fair to good. (*Id.* at 377).

26 In weighing medical source opinions in Social Security cases, the Ninth  
27 Circuit distinguishes among three types of physicians: 1) treating physicians, who  
28 actually treat the claimant; 2) examining physicians, who examine but do not treat



1 the claimant; and 3) non-examining physicians, who neither treat nor examine the  
2 claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Generally, more  
3 weight is given to the opinion of the treating physician than to the opinions of  
4 non-treating physicians. *Id.* If a treating physician's opinion is uncontradicted, it  
5 may be rejected only for clear and convincing reasons, and if it is contradicted, it  
6 may be rejected for specific and legitimate reasons supported by substantial  
7 evidence in the record. *Id.* An ALJ need not accept the opinion of a treating  
8 physician, "if that opinion is brief, conclusory, and inadequately supported by  
9 clinical findings" or "by the record as a whole." *Batson v. Comm'r of Soc.Sec.*  
10 *Admin*, 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004) see also *Thomas v. Barnhart*, 278 F.3d  
11 947, 957 (9<sup>th</sup> Cir. 2002); *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir.  
12 2001).

13 The ALJ gave extensive reasons for why she credited the testimony of  
14 independent medical expert Margaret Moore, PhD, who testified at the hearing.  
15 The ALJ found the record as a whole consistent with Dr. Moore's testimony and  
16 that her testimony "best summarizes the claimant's mental situation in noting that  
17 the claimant does retain some symptoms and will have moderate social  
18 difficulties." (ECF No. 11-2, p. 20). The ALJ's opinion demonstrates careful  
19 review of the medical records and discusses Dr. Mashburn, therapist David  
20 Hulslander, Crystal Coffey, Deborah Dove, Dr. Mark Hoover, Rita Flanagan, Dr.  
21 Norman Staley, and Dr. Jean Crane.

22 As to the opinions of Leslie Thompson and Brett Wenger, which were not  
23 specifically discussed by the ALJ, it is noted that portions of those opinions  
24 predate the alleged onset date of disability. See *Carmickle v. Commissioner*, 533  
25 F.3d 1155, 1165 (9<sup>th</sup> Cir. 2008)("Medical opinions that predate the alleged onset  
26 of disability are of limited relevance."). Additionally, the opinions of Ms.  
27 Thompson and Mr. Wenger are not strongly supportive of a finding of disability.  
28

1 Ms. Thompson's report, from November 2008, two months prior to the alleged  
2 onset of disability, stated that Plaintiff was "unlikely able to maintain full time  
3 employment **at this time.**" (ECF No. 11, p.335)(emphasis added). It was also  
4 recommended that she attend job training to expand her skills. In December 2009,  
5 Mr. Wenger found that Plaintiff was experiencing benefit to all areas of function  
6 from anti-depressant medication and would likely be able to resume substantial  
7 gainful activity. (*Id.* at 353-55). Additionally, he indicated that vocational training  
8 would minimize or eliminate barriers to employment. (*Id.*).

9 Dr. Mashburn completed an evaluation of Plaintiff in March 2008, nearly  
10 nine months before the alleged date of onset. Although Dr. Mashburn did note  
11 one "marked" limitation in the ability to respond appropriately to and tolerate the  
12 pressures and expectations of a normal work setting, he also wrote in his report:  
13 "she doesn't want to work now (she wants to take care of grandkids) regardless of  
14 treatment..." (ECF No. 11, p. 216). Further, at the time of his report Plaintiff was  
15 not taking any medication for anxiety. Dr. Mashburn indicated an expected  
16 duration of 9 months to 2 years for Plaintiff's functional limitations. Nine months  
17 from March 2008 is January 2009, the alleged date of onset.

18 As to the opinion of Dr. Crane, the ALJ explained that Dr. Crane's  
19 conclusion that Plaintiff could not work full-time due to neck pain was not even  
20 consistent with Dr. Crane's own records which showed no more than mild to  
21 moderate neck pain. The ALJ also noted that Dr. Crane's Medical Report of  
22 December 9, 2009, stated that there were "few records in this office" to review,  
23 and thus Dr. Crane's conclusions are not based on a thorough review of Plaintiff's  
24 treatment history. The ALJ explained that the inconsistencies between Dr. Crane's  
25 opinion and the medical evidence caused her to grant the opinion "little weight".  
26 (ECF No. 11-2, p. 22).  
27  
28

1 Plaintiff argues that counselor David Hulslander, B.A., opined that  
2 Plaintiff's impairments constituted a serious limitation that prevented her from  
3 working as she wanted to. (ECF No. 18, p. 13). Plaintiff does not cite to a specific  
4 page in the record to support this assertion. The ALJ did discuss the treatment  
5 notes of David Hulslander, noting that Hulslander observed Plaintiff's "willing  
6 energy" and that she was "comfortable providing ideas" during their sessions.  
7 (ECF No. 11-2, p. 20). Hulslander's records, as a whole, do not support a  
8 conclusion that Plaintiff is disabled, or unable to work. For example, his notes  
9 from April 16, 2009, indicate that Plaintiff "is highly interested in cycling and  
10 being outdoors in order to be in shape and she would like to be able to do this and  
11 not be so concerned about what other people might be thinking." (ECF No. 11, p.  
12 308). Mr. Hulslander's records also raise some concern regarding Plaintiff's  
13 compliance with treatment, speaking of a delay in coming in for services, "lack of  
14 contact," and what to do if Plaintiff "no-shows the next appointment". (*Id.* at 315-  
15 16).

17 Additionally Mr. Hulslander is listed as "B.A." (presumably Bachelor of  
18 Arts) and therefore is not an acceptable medical source, but would rather be "other  
19 source" evidence. "[O]nly licensed physicians and certain other qualified  
20 specialists are considered acceptable medical sources." *Molina v. Astrue*, 674 F.3d  
21 1104, 1111 (9<sup>th</sup> Cir. 2012). In fact, Hulslander, B.A., Thompson, M.A., and  
22 Wenger, LMHC, are all "other source" evidence. See for example *Lassley v. Apfel*,  
23 243 F.3d 548 (9<sup>th</sup> Cir. 2000)(therapist and licensed medical counselor was "'other  
24 source', whose opinion the ALJ may give less weight than that of an acceptable  
25 medical source."); *Fisher v. Astrue*, 429 Fed.Appx. 649 (9<sup>th</sup> Cir. 2011)(licensed  
26 mental health counselor not an acceptable medical source).

27 The ALJ appears to have thoroughly considered the medical record. As  
28 discussed *supra*, the ALJ gave specific and legitimate reasons for the weight

1 assigned to the various opinions. To the extent the ALJ did not thoroughly explain  
2 the weight given to the mental health counselors' records (Hulslander, Wenger,  
3 and Thompson), the ALJ need not specifically discuss every piece of evidence.  
4 See *Roberts v. Commissioner*, 434 Fed.Appx. 657 (9<sup>th</sup> Cir. 2011)(“While the ALJ  
5 may have erred by failing to mention the treatment notes of Drs. Coelho, Parvin,  
6 and Saunders...any such error was harmless...”). An error is harmless, if it is  
7 inconsequential to the ultimate nondisability determination. *Tommasetti v. Astrue*,  
8 533 F.3d 1035, 1038 (9<sup>th</sup> Cir. 2008).

9 **B. Did the ALJ err in failing to properly consider or reject Plaintiff's**  
10 **subjective complaints?**

11 In deciding whether to accept a claimant's subjective symptom testimony,  
12 the ALJ “must perform two stages of analysis: the *Cotton* analysis and an analysis  
13 of the credibility of the claimant's testimony regarding the severity of her  
14 symptoms.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). The *Cotton*  
15 analysis comes from the Ninth Circuit's opinion in *Cotton v. Bowen*, 799 F.2d  
16 1403 (9<sup>th</sup> Cir. 1986), and thereunder the claimant must: 1) produce objective  
17 medical evidence of an impairment or impairments; and 2) show that the  
18 impairment or combination of impairments could reasonably be expected to  
19 produce some degree of symptom. *Smolen*, 80 F.3d at 1281-82. If a claimant  
20 meets the *Cotton* test, then the ALJ may reject the claimant's testimony regarding  
21 the severity of symptoms only based on specific, clear, and convincing reasons. *Id.*  
22 at 1284.

24 The ALJ concluded that Plaintiff's medically determinable impairments  
25 could be expected to cause the alleged symptoms. (ECF No. 11-2, p. 18). The ALJ  
26 was then required to assess the credibility of Plaintiff's testimony concerning the  
27 severity of her symptoms and limitations. The ALJ found that Plaintiff's  
28 statements concerning intensity, persistence, and limiting effects of her symptoms

1 were not entirely credible.

2 The ALJ gave several reasons for this determination. The ALJ noted that  
3 Plaintiff had told health care providers she did not want to work, but wanted to  
4 stay home and take care of her grandchildren. The ALJ also observed that  
5 Plaintiff willfully chose to discontinue prescription medications which had been  
6 helpful. The ALJ also found that her long-term reliance on public assistance  
7 raised secondary gain concerns.

8 The ALJ did not entirely reject Plaintiff's subjective complaints, nor did the  
9 ALJ make an affirmative finding of malingering. However, the ALJ did find that  
10 Plaintiff's complaints were not entirely credible and were at times inconsistent  
11 with the medical record. In sum, the ALJ articulated numerous clear and  
12 convincing reasons why the ALJ concluded that Plaintiff's subjective complaints  
13 were inconsistent with her daily activities and with aspects of the medical record.  
14 The ALJ found her testimony concerning limitations inconsistent with her  
15 activities of daily living including being the primary care giver for two  
16 grandchildren for nearly two years. The fact that Plaintiff can partake in daily  
17 activities is not determinative of disability. *Magallanes v. Bowen*, 881 F.2d 747,  
18 756 (9<sup>th</sup> Cir. 1989). However, the ability to participate in such activities is  
19 relevant to Plaintiff's credibility to the extent that the level of activity is in fact  
20 inconsistent with the claimed limitations.  
21

22 The ALJ also found Plaintiff's testimony regarding limitations inconsistent  
23 with aspects of the medical record. The court finds that a review of the entire  
24 medical record does not support a finding of error by the ALJ. Although the ALJ  
25 made no affirmative finding of malingering, evidence that Plaintiff was not taking  
26 medication, which had proved effective, could be considered by the ALJ as  
27 evidence of malingering, or at least a convincing reason to question her credibility.  
28 See *Chaudhry v. Astrue*, 688 F.3d 661, 672 (9<sup>th</sup> Cir. 2008)("If a claimant

1 complains about disabling pain but fails to seek treatment, or **fails to follow a**  
2 **prescribed treatment**, for the pain, an ALJ may use such failure as a basis for  
3 finding the complaint unjustified or exaggerated.”)(emphasis supplied).

4 The ALJ, not this court, is responsible for determining credibility, resolving  
5 conflicts in the medical testimony, and resolving ambiguities. *Edlund v.*  
6 *Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001). An ALJ, when making a  
7 credibility determination adverse to the Plaintiff, must give specific, clear, and  
8 convincing reasons for doing so. *Thomas v. Barnhart*, 278 F.3d 947, 958-9 (9<sup>th</sup>  
9 Cir. 2002). If the ALJ’s credibility finding is supported by substantial evidence in  
10 the record, then the court must not engage in second-guessing. *Id.* at 959. In this  
11 case, the ALJ gave clear and convincing reasons, supported by the record, for  
12 finding Plaintiff’s testimony concerning her limitations to be not entirely credible.

13 **C. Did the ALJ err at Step 5 in identifying jobs Ms. Sampson could**  
14 **perform?**

15 Although this point of error is phrased as a failure to identify specific jobs,  
16 the ALJ did identify specific jobs, and Plaintiff’s argument actually complains that  
17 the ALJ asked an improper hypothetical to the vocational expert which did not  
18 include all of Plaintiff’s limitations. The ALJ did not err in posing the  
19 hypothetical question. An ALJ is required to include only those limitations she  
20 finds supported by substantial evidence in her hypothetical question. *Osenbrock v.*  
21 *Apfel*, 240 F.3d 1157, 1162-63 (9<sup>th</sup> Cir. 2001).

23 Plaintiff argues that the ALJ was required to use Dr. Crane’s limitation that  
24 Plaintiff would miss at least four days of work per month. As discussed *supra*, the  
25 ALJ gave clear and convincing reasons for why she gave Dr. Crane’s opinion  
26 “little weight” including that it was not based on a thorough review of treatment  
27 history and was inconsistent with the medical record. (ECF No. 11-12, p. 22).  
28 Plaintiff also complains that the hypothetical did not include her mental limitations

1 and that anxiety limits her ability to function around others. However, the ALJ did  
2 consider her anxiety and incorporate limitations that the hypothetical worker  
3 “would need to work in a job away from the general public, could be in proximity  
4 to others, but not in close cooperation, and would need to be in a job that would  
5 have routine.” (ECF No. 11-2, p. 66). The ALJ also asked questions about the  
6 specific jobs identified and whether they involved interaction with the public. The  
7 ALJ did not err at Step 5.

### 8 **VIII. CONCLUSION**

9 The Commissioner’s and ALJ’s decision is supported by substantial evidence  
10 in the record and is based on proper legal standards. By reason thereof, this court  
11 must affirm the decision. *Lewis v. Astrue*, 498 F.3d 909, 911 (9<sup>th</sup> Cir. 2007).

12 For the aforesaid reasons, the Commissioner's decision must be affirmed by  
13 this court.

### 14 **IT IS HEREBY ORDERED:**

15 1. Plaintiff’s Motion for Summary Judgment (ECF No. 17) is **DENIED**.

16 2. Defendant’s Motion for Summary Judgment (ECF No. 23) is  
17 **GRANTED**.

18 3. The Clerk is directed to enter Judgment dismissing the Complaint and  
19 the claims therein with prejudice.  
20

21 **IT IS SO ORDERED.** The District Court Executive is directed to file this  
22 Order, enter Judgment as directed above, and close this file.

23 DATED this 22<sup>nd</sup> day of May, 2013.

24 s/ Justin L. Quackenbush  
25 JUSTIN L. QUACKENBUSH  
26 SENIOR UNITED STATES DISTRICT JUDGE  
27  
28